United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief for Appellant

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United States Court of Appeals for

The District of Columbia Circuit

No. 24, 821

UNITED STATES OF America

Appellee

v.

Sammy L. GARRETT

Appellant

Appeal from a Judgment of the United States

District Court for the District of Columbia

Charles A. Dukes, Jr.

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TABLE OF CASES

Criminal Law, Perkins, Foundation Press, Inc., 1957.

This case has not previously been before the Court, under the same or any other title.

Brief for Appellant

United States Court of Appeals for

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Sammy L. GARRETT

Appellant

Appeal from a Judgment of the United States

District Court for the District of Columbia

Statement of Questions Involved

The principal issues presented for review in this case are:

1. Did the Court err in failing to define at length "assault" as part of its instructions?
2. Did the Court err in failing to instruct the Jury on the issue of self-defense?
3. Was there any evidence from which the Jury could find that any assault had been committed?

REFERENCES TO RULINGS

Reservation of defense motion of judgment of acquittal (T-63). Jury Instructions on Assault (T-148).

STATEMENT OF CASE

This case arises from notice of appeal, timely files, by the appellant, Sammy L. Garrett, who was found guilty on two counts: Assault with a dangerous weapon and carrying a dangerous weapon, by a jury following a plea of not guilty as to both counts. Defendant's motion for judgment of acquittal at the conclusion of the Government's case was reserved by the Court but the Court failed to rule on it at the conclusion of the case and trial defense counsel did not renew his motion at the conclusion of the defense of the issues. On October 16, 1970, the appellant was sentenced on each count to 20 months to five years, sentences to run concurrently. Appellant has been permitted by the District Court and by this Court to proceed on appeal in forma pauperis.

SUMMARY OF ARGUMENT

This case involves a domestic squabble wherein the prosecutrix testified that the appellant assaulted her

with a pistol which he had been carrying around the apartment. Appellant testified that it was the prosecutrix who assaulted him. The record fails to contain any testimony that either of them was placed in fear of the other by any of the alleged acts. Appellant contends that the Trial Court failed to adequately instruct the jury with respect to the crime of assault and the crime of assault with a dangerous weapon. In addition, Appellant testified that she had pointed the weapon at him and that he had to knock it from her hands. Appellant contends that the jury should have been instructed with respect to self defense. While there is no objection of record by trial defense counsel to the Court's instructions, Appellant contends that it was substantial error for the jury not to have been so advised which deprived him of due process.

ARGUMENT

A. Facts:

The trial of Sammy Garrett records the unhappy ending of an unhappy on-again-off-again love affair between the Appellant and the prosecutrix who bore his illegitimate son five years ago. On March 30, 1970, he spent the night with the prosecutrix, (Wallasine Jeannette

Martin), her eight children and her girl griend, (Ann Blakely) as was his custom from time to time (T-5). The evening passed apparently without major incident (T-7 & 8) and he slept until almost midmorning. A weapon was observed in his possession (T-7) but it caused no alarm or distress. The prosecutrix testified the Appellant got up, bought a half pint of gin and brought it back to share with her (T-9). A conversation ensued as the bottle emptied. The prosecutrix testified Appellant indicated that "If I can't have you ain't nobody going to have you" and put the weapon "to my stomach." She then called to her son and had him telephone the police. She then testified Appellant "took the gun apart and threw it down the fire escape." (T-11). Police later recovered the weapon and introduced it into evidence as Exhibit #1. Her son testified that he had been asked by his mother to call the police (T-32) while Appellant "was holding" his mother (T-33). The 13 year old boy said he later saw Appellant throw a gun out the window but did not see it prior to that time (T-33). The girl friend corroborated the prosecutrix's testimony.

Appellant took the stand in his own behalf. He testified that he was the father of one of Mrs. Martin's

children and that he contributed to their support by giving her about $100.00 a week (T-70). He denied threatening her (T-72) and testified a dispute arose that day over her friends and the use of narcotics (T-72, 73). He further testified he was lying on the bed when he heard her ask to have the police called. She then told him she wanted him out of the way (T-75, 76) and drew the gun on him before the police came (T-96). He "knocked it out of her hands...it hit the table and bounced out the window." (T-97). He was apprehended at the scene.

The Court instructed the jury as follows with respect to the element of assault: "The essential elements of the offense of assault with a dangerous weapon, each of which the Government must prove beyond a reasonable doubt, are:

(One) That the defendant committed an assault upon the complainant and,

(Two) That he did so with a dangerous weapon, and

(Three) That at the time of the commission of the assault he intended to do the acts which constituted the assault.

Now ladies and gentlemen of the Jury, an assault is an

attempt or effort with force or violence to do injury to the person of another, coupled with the apparent present ability to carry out such intent.

An assault may be committed without actual touching or striking or by committing bodily harm to another. Also, ladies and gentlemen of the Jury, you will note that in giving you the three essential elements of the offense of assault with a dangerous weapon, I said that at the time of the commission of the assault the defendant then intended to do the acts which constituted the assault."

B. Argument:

The alleged assault in the case at bar is a classic example of "If it were not assize time, I would not take such language from you." Appellant stated: "If I can't have you ain't nobody going to have you." As he had just spent the night with the prosecutrix and the better part of the morning drinking with her, there is nothing in the record to show that he in fact had lost her. More importantly, there is no demonstration in the record that there was an unpermitted touching or that the prosecutrix was ever placed in fear of any kind. A threat

of future violence is obviously insufficient for an assault, because it is neither an attempt to commit a battery nor an act of placing the other in apprehension of receiving an immediate battery. (Criminal Law, Perkins, Foundation Press Inc., 1957, pg. 94). She did testify that he touched her but at no time did she indicate that she was in fear of him or that he would carry out his conditional threat. In fact, the prosecution solicited testimony that he was even invited to shoot her but that he reacted by emptying the gun and tossing it out of a window. The facts clearly demonstrate that the prosecutrix was never placed in fear by the actions of the Appellant and that she had no reason to believe he would harm her at the time in question.

A specific request was made for a definition of assault to be given to the Jury. The Court indicated such a definition would be a part of the Jury Instructions but it was not done. Instead an incomplete definition was given and the jury was not advised that a threat could be conditional and therefore not proof of an assault. It was also left to speculate that the prosecutrix was in some manner placed in fear by the conduct of the Appellant. The Jury

should have been specifically instructed as to the individual elements of an assault with particular reference to threats or fear. The evidence showed the couple had lived together on and off for a period of many years. The relationship obviously was far from stable and no one can be sure, in the absence of specific testimony, what she was experiencing during those minutes. The mere fact that she asked her son to call the police is not sufficient to demonstrate fear on her part. She was in an apartment with all her children and a friend. She took no steps to alarm them or protect them in any way. It is equally probable that she was not in fear of him but asked her son to call the police just to be rid of him or even to bluff him into leaving. The Jury was permitted to speculate without evidence and without benefit of specific instructions. To so permit a Jury is to commit error.

Appellant's testimony raised the specter of self-defense. It was his testimony that the prosecutrix had the weapon rather than himself and that she had pointed it in his direction. He then testified that he knocked the weapon from her hand. In the absence of any instructions, the Jury could have taken his admission that he struck the

weapon from her hand as an indication that he did assault her. Accordingly, the Jury should have been instructed as to the law on self-defense and this failure was error.

CONCLUSION

Appellant respectfully submits that the evidence of record demonstrates that he was in fact a resident of the apartment in which the events took place, and that the prosecutrix was never placed in fear by the events of which she testified. Appellant further submits he was deprived of due process of law in that there was no ruling on his motion for judgment of acquittal, there was an inadequate instruction as to the crimes of assault and assault with a dangerous weapon, and no instruction as to self-defense which the Court should have given sui generis.

Accordingly, Appellant respectfully prays that this Honorable Court set aside the Jury finding and that it set aside the judgment of the trial Court.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,821

UNITED STATES OF AMERICA, APPELLEE

v.

SAMMY L. GARRETT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
DANIEL E. TOOMEY,
JOHN S. RANSOM,
Assistant United States Attorneys.

Cr. No. 1054–70

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

419-755—71

ISSUE PRESENTED*

In the opinion of appellee, the following issue is presented:

Whether the evidence was sufficient to sustain appellant's conviction of assault with a dangerous weapon, when it showed that appellant placed a gun against the complainant's stomach and said, "If I can't have you, ain't nobody going to have you"?

*This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,821

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed June 22, 1970, appellant was charged with assault with a dangerous weapon and carrying a pistol without a license (22 D.C. Code §§ 502, 3204). Trial commenced on September 4 and continued on September 8, 1970, before the Honorable Joseph C. Waddy and a jury. Appellant was found guilty on both counts. On October 16, 1970, appellant was sentenced to imprisonment for twenty months to five years on count one and five to twenty months on count two. The sentences were to run concurrently with each other but consecutively to the term of imprisonment which appellant was then serving in another case. This appeal followed.

On March 31, 1970, Mrs. Wallacine Martin and her eight children resided in an apartment at 11 R Street, N.E., with Annie Blakely (Tr. 3–4). Mrs. Martin at that time had known appellant, whom she identified in court, for approximately five years and had been considered his girl friend. Occasionally appellant stayed at the Martin residence, the longest of such

visits having been for about two weeks (Tr. 5). At the time of the incident giving rise to the instant complaint appellant resided with his mother, although he spent the evening of March 30 at the Martin residence (Tr. 5–6).

During the evening hours of March 30, 1970, appellant and Mrs. Martin had engaged in acrimonious conversation about the proposed discontinuance of their relationship, a proposal instituted by Mrs. Martin. That evening appellant roamed about the Martin household with a pistol showing in the vicinity of his vest, stating that he was tired of "people messing over him" (Tr. 7). Appellant remained in the Martin apartment overnight and arose the following morning about 9:30 or 10:00 o'clock, whereupon he immediately proceeded to the liquor store and returned with a half-pint of gin which he and Mrs. Martin consumed.[1] About 12:25 that same day, while appellant and Mrs. Martin were in the kitchen, appellant drew the pistol from his clothing and told Mrs. Martin, "If I can't have you, ain't nobody going to have you." He then placed the gun against Mrs. Martin's stomach (Tr. 8–10).

With the gun in her stomach, Mrs. Martin summoned sufficient courage to cry out to her son, Calvin Martin, and urged him to call the police. Miss Annie Blakely was also present. Shortly after Mrs. Martin called to Calvin, he entered the kitchen, and appellant took the gun apart and threw it out the window, ostensibly down the fire escape. When the police arrived, one of the officers retrieved the weapon from the fire escape immediately outside the window. Mrs. Martin identified Government Exhibit No. 1 as the gun with which appellant assaulted her and which the police officer had recovered outside her window (Tr. 10–12, 14).

On cross-examination Mrs. Martin testified that her five-year-old son, Robert Thomas Martin, had been sired by appellant (Tr. 16–17). Mrs. Martin maintained that appellant did not provide for the support of the child, and she denied that appellant ever argued with her concerning the care of their child (Tr. 22–24). Mrs. Martin further denied that she

[1] Mrs. Martin testified that she drank about one-half an inch of gin, but there was no testimony concerning how much appellant consumed (Tr. 9).

ever tried to strike appellant with an automobile and also denied that she possessed a gun in her home (Tr. 20–21, 23).

Calvin Martin testified [2] that appellant, whom he identified in court, was present at his home on the 31st of March. When he arrived in the kitchen in response to his mother's call, appellant was holding Mrs. Martin with one hand and keeping the other hand behind his back. Calvin called the police and returned to the kitchen, where he saw appellant throw the gun out of the window. He thereafter identified Government Exhibit No. 1 as that gun (Tr. 30, 32–33, 35). Ann Blakely observed appellant stick a gun into the stomach of Mrs. Martin and heard him declare, "If I can't have you, then nobody going to have you" (Tr. 40–41). When she first arrived in the kitchen, appellant was holding Mrs. Martin with one hand and pointing the gun at her with the other hand. The gun she saw was the same one she had observed appellant carrying the previous evening tucked in his pants as he walked around the apartment (Tr. 42–43). She also witnessed appellant discard the weapon out the window (Tr. 43).

Officer Thessel Reeves of the Metropolitan Police responded to 11 R Street, N.E., on March 31. After talking with numerous people, he went downstairs and to the back of the building, where he found two rounds of ammunition. Thereafter he located a pistol on the fire escape right outside Mrs. Martin's kitchen window (Tr. 50–53). The bullets he recovered were tried in the gun and found to fit (Tr. 53). After he arrested appellant and took him to the station, a search of appellant's vest pocket yielded a bullet similar to those which the officer found outside the apartment (Tr. 54).

Officer Reeves testified that he was present when the pistol was test-fired and was found to be operable. He thereafter identified Government Exhibit No. 1 as the weapon he recovered. Government Exhibits Nos. 2 and 3 were identified by Officer Reeves as the envelope in which the bullets had been placed

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[2] The trial court conducted a lengthy inquiry prior to the testimony of Calvin Martin, who was thirteen at the time, to determine his competency to testify. The trial court's determination of competency was accepted by appellant's counsel (Tr. 25–29).

and the bullets which he recovered, respectively (Tr. 55–57).[3] The Government thereafter moved its exhibits into evidence without objection from appellant and rested its case (Tr. 60). After counsel for appellant made his opening statement, the prosecutor made a motion to reopen his case, which was granted without objection. Thereafter Government Exhibit No. 4, a certificate which stated that on March 31, 1970, appellant did not have a license to carry a weapon, was admitted into evidence without objection (Tr. 65). The court reserved decision on appellant's motion for judgment of acquittal until the completion of the trial (Tr. 63–64).

Appellant testified on his own behalf. He stated that he and Mrs. Martin had lived together off and on for the preceding five years and that she had given birth to a child sired by him (Tr. 66–68). He further testified that he was employed and received $250 per week, $100 of which he gave weekly to Mrs. Martin to purchase food (Tr. 69–70). Appellant denied that he either had a gun or threatened Mrs. Martin with a gun. He stated that the incident which gave rise to the prosecution followed an argument that he had had with Mrs. Martin about her use of the weekly $100 to buy dope, which he saw around the house all the time (Tr. 71–73). On March 31, while he was still in bed, Mrs. Martin instructed her daughter to call the police.[4] Appellant thought she was teasing, but the call was placed. The gun that was in the apartment, according to appellant, belonged to Mrs. Martin, and she was the one in possession of it prior to the time the police arrived (Tr. 75–76).

Appellant further testified that about one week before the incident in Mrs. Martin's apartment, she had come to Seaton Street near his home and threatened him. While he did not see her pull a weapon, "she drew her pocket [*sic*] * * * and

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[3] There were five bullets in the envelope. Two of the bullets he identified as having been found beneath the fire escape immediately outside Mrs. Martin's kitchen window; one bullet had been discovered in the pistol; and one bullet had been discovered in appellant's breast pocket. Officer Reeves was unable to identify the fifth bullet and was unable to explain its presence, although his partner had also searched appellant (Tr. 57–58).

[4] Although appellant testified he was in bed at this time, he thereafter testified that he had previously gone to the liquor store and purchased gin and beer (Tr. 79).

then got in my car." When he looked in the car, Mrs. Martin and her friend Annie were sitting there; Annie was holding a butcher knife, and Mrs. Martin had her hand in her pocket in a menacing manner exclaiming that she was going to kill him. Although appellant was frightened, apparently nothing further occurred (Tr. 76–78).

On cross-examination appellant testified at length to the narcotics transactions he had observed at the home of Mrs. Martin and the administration of narcotics which had occurred there (Tr. 89–96). He further stated not only that Mrs. Martin had the gun on the date in question, but that she pointed it at him and threatened him with it. He thereafter knocked it out of her hand, and it struck a table "and bounced out the window" (Tr. 96–97). After the gun went out the window, Annie struck him on the head, and one of the children began to beat him with a board because Mrs. Martin allegedly wanted him killed. He further stated that when the gun hit the table, the bullets scattered over the table (Tr. 99–100). After he was arrested, appellant remembered, the police searched him and found in his pocket a money clip with a bullet in it. He had no idea how the money clip happened to be in his pocket, however, since he never carried one (Tr. 102).

Mr. Willy Robinson testified that he lived at the Seaton Place address where appellant's mother resided and where appellant stayed on occasion. He stated that he had witnessed appellant arguing with two ladies in a car in front of his address about a week before March 31. He asked the ladies to leave appellant alone, but since he had to leave, he did not know what occurred thereafter (Tr. 109–112). The Government in rebuttal recalled Mrs. Martin, who denied that she ever possessed any drugs (Tr. 116).

Prior to charging the jury, the trial court asked if there were any specific instructions requested. The Government proposed one instruction, which was granted in substance without any objection from appellant. Appellant requested a lesser included offense instruction on simple assault, which was granted without objection from the Government. Thereafter the Govern-

ment requested that the court define assault for the jury, and the court replied that it always gave a definition of assault (Tr. 120–121). After closing arguments and the charge to the jury, the jury retired to deliberate. Thereafter appellant was found guilty on both counts of the indictment (Tr. 160).

ARGUMENT

The evidence was sufficient to sustain appellant's conviction of assault with a dangerous weapon.

(Tr. 3–65)

Appellant contends that the trial court failed to instruct the jury adequately on the issue of assault. Although the question was neither presented nor preserved at trial,[5] appellant asserts that the trial court should have instructed the jury "that a threat could be conditional and therefore not proof of an assault" and that, in order for one to be convicted of assault, it is essential that proof exist that the complainant was touched or placed in fear by the accused.

Appellant's argument, if we understand him correctly, is that elements essential to sustain a conviction of the crime of assault were not proved as a matter of law. Since, if the crime

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[5] At trial, pursuant to the invitation of the court for the submission of proposed instructions, the prosecutor requested that the court charge the jury with "an instruction which will include a definition of assault" (Tr. 120–121). Thereafter the court exhaustively instructed the jury in accordance with the "red book," JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Nos. 53 and 55 (1966). Appellant neither proffered any instructions nor objected to the instructions as presented. Further, at the conclusion of the instructions, the court inquired if either counsel had any suggestions or recommendations concerning the instructions. Counsel for appellant stated, "I am satisfied with the charge, your Honor" (Tr. 156). The failure to object to the instructions, as required by Rule 30, FED. R. CRIM. P., as well as the failure to offer any instructions, should now preclude appellant from assigning any portion of the charge or omission therein as error. *Pitts* v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950). Nor do we believe that either asserted omission constitutes plain error cognizable under Rule 52 (b), FED. R. CRIM. P. However, we do not understand appellant's argument on appeal to be specifically directed to the question of the completeness of the jury instructions.

were not proved, the trial court should have acquitted appellant *sua sponte* or upon appellant's timely motion, without reference to the jury and thus without the necessity of jury instructions, we shall confine our presentation solely to the question of whether or not the trial court erred by not acquitting appellant on the ground that an essential element of the crime of assault was not proved.

Appellant initially asserts that the words, "If I can't have you, ain't nobody going to have you," spoken contemporaneously with the actions upon which the assault was predicated, *i.e.*, the placing of the gun in the stomach of the complainant, did not evidence a present intent to commit an assault, but rather indicated a condition which upon fulfillment would result in a response detrimental to the complainant, *i.e.*, if the complainant refused to continue their relationship, appellant would *then* commit an assault upon her. Therefore, appellant asserts, the evidence was insufficient as a matter of law to sustain a conviction of assault since the requisite *present* intent was missing. We believe appellant misconstrues the law and misreads the facts.

In the first instance, the words, "If I can't have you, ain't nobody going to have you," are in no manner conditional. While appellant maintains that the evidence does not show that he had "lost" the complainant and could no longer maintain her association, this position is unequivocally denied by the testimony which clearly indicated that appellant had been advised that his presence was no longer wanted (Tr. 7–8, 47–48). The remarks of appellant were precipitated solely by the complainant's expressed avowal to disassociate herself from his company. Appellant's remarks and actions were in recognition of this desire professed by the complainant, and his statement was a definitive utterance ascribing a purpose to his assault.

While appellant relies on the ancient quotation, "If it were not assize time, I would not take such language from you," in support of his proposition, it is evident that his reliance is

misplaced. That expression clearly exhibits a present intent *not* to commit an assault. It is nothing more than a declaration of desire which would be effected but for an intervening event over which neither party had control. The instant case is quite different. Appellant placed a gun in the stomach of the complainant and declared, "If I can't have you, ain't nobody going to have you." It is quite plain that appellant then and there intended to assault the complainant and in fact did assault her. *Cf. United States* v. *Bridges*, 139 U.S. App. D.C. 259, 432 F.2d 692 (1970).

Appellant next asserts that there was neither an unpermitted touching nor fear engendered in the complainant, and therefore the evidence was insufficient to establish an assault. In the first instance, it is clear that an unpermitted touching is not an element essential to proof of an assault.

> [An assault is] an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person. *Guarro* v. *United States*, 99 U.S. App. D.C. 97, 99, 237 F. 2d 578, 580 (1956), citing *Patterson* v. *Pillans*, 43 App. D.C. 505, 506–507 (1915).

Secondly, the evidence adduced at trial clearly indicated that appellant placed his gun in the stomach of the complaint (Tr. 10). Even if it were assumed that an unpermitted touching was necessary, the jury could have found such a touching. The final contention of appellant, that it is necessary to show that the complainant was placed in fear by the actions of the alleged assaulter, is equally invalid. The law is quite clear that "actual fear on the part of the person assaulted is not a necessary element of the crime." *Harris* v. *United States*, 201 A. 2d 532, 534 (D.C. Ct. App. 1964). Appellant's contentions that the evidence was insufficient to sustain his conviction because of the asserted

absence of proof of essential elements are thus without validity.[6] *See Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F. 2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied*, 381 U.S. 837 (1947).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[6] Appellant additionally claims that the trial court erred by not *sua sponte* instructing the jury on self-defense. We note initially that appellant neither proffered such an instruction at trial nor objected to its omission, which should now preclude him from raising the issue. *Pitts* v. *United States*, *supra*. Secondly, no evidence existed which could be considered as fairly raising the self-defense issue. Appellant testified that he did not have a pistol, and the complainant and others testified that he did. At no time did he assert, nor did any other evidence indicate, that he possessed or used the pistol in self-defense. *Cf. United States* v. *Daniels*, D.C. Cir. No. 22,913, decided October 15, 1970. Appellant asserts that the jury could have believed that he assaulted the complainant when, according to his testimony, he knocked the pistol from the hand of the complainant, striking her in the process. This argument ignores the fact that he was charged and convicted of assault *with a dangerous weapon*. A self-defense intruction predicated on the ground that he assaulted the complainant by knocking the pistol from her hand was unnecessary, since if the jury believed his testimony he could not have been convicted of the charge. Their verdict evidenced a clear rejection of his version of the event. We further note that appellant was also convicted of carrying a dangerous weapon, which further demonstrates the belief of the jury that appellant possessed the weapon in question.

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